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Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 785

Case No. 862: WHITE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Mikuin Leliel Balanda; Ms. Deborah Taylor Ashford;

Whereas, on 19 May 1995, Thomas C. White, a staff member of the United Nations, filed an application requesting the Tribunal:

"A. To find that the suspension of the Applicant, for actions taken two years previously in a different duty station, and the maintenance of the suspension for a period of six months for no good reason, constituted an abuse of the Respondent's disciplinary authority, prejudiced the Applicant's right to a fair hearing, and caused irreparable damage to his career and his good name and reputation;

B. To find that the Applicant was denied full due process in that a highly damaging statement submitted belatedly to the Joint Disciplinary Committee [JDC] was not made available to the Applicant or his counsel before the JDC report was forwarded to the Under-Secretary-General, DAM [Department of Administration and Management];

C. To find that the Secretary-General's decision, dated 16 February 1995, to impose upon the Applicant a disciplinary sanction far in excess of that recommended by the Joint Disciplinary Committee, was inconsistent with his basic conclusion that the Applicant 'failed to exercise proper judgement', an offence usually meriting a reprimand at most, and was tainted by prejudice;

D. To find that, by excluding the element of intent, and by failing to take fully into account the surrounding circumstances, the Secretary-General unfairly characterizes as serious misconduct the Applicant's good faith effort to provide accommodation for staff in a situation of emergency; and

E. To find that the actions of the Respondent have damaged the Applicant's good name, reputation and career, and to order appropriate compensation therefor."

Whereas the Respondent filed his answer on 18 December 1995;

Whereas, on 29 April 1996, the Applicant filed written observations in which he requested the Tribunal:

"a. To order a rescission of the Secretary-General's decision conveyed to the Applicant in [the Under-Secretary-General for Administration and Management]'s letter of 16 February 1995 and order the Applicant's reinstatement to a position of trust and responsibility at the P-5 level;

b. To order that no impediment be put in the way for him to be considered eligible for promotion to the D-1 level, and to a post commensurate with his experience and ability;

c. To order compensation to the Applicant for moral and material injury to him as a result of the unjustified suspension and imposition of the disciplinary measure of demotion; that such compensation should include an amount equivalent to SPA [Special Post Allowance] to D-1 for his duty as Chief Technical Services of UNOSOM [United Nations Operation in Somalia] II Somalia, and such as would compensate for the difference in remuneration in other emoluments between what was actually received by him and what he would have been entitled to in the absence of the disciplinary measure;

d. To order that suitable measures be taken to restore the Applicant's reputation and good name and to remove the misimpression created by the unjustified disciplinary action;

e. Alternatively, and should the Secretary-General not accede to the Tribunal's decision to rescind the disciplinary measure, the Applicant prays that adequate compensation be ordered in his favour, bearing in mind the serious moral and material injury done to him and the damage to his reputation and integrity."

Whereas, on 21 October 1996, the President ruled that no oral proceedings would be held in the case;

Whereas, on 28 October 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which he did, on 1 November 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 14 July 1985, on a two-year fixed-term appointment at the P-4 level, as Chief, Logistics and Support Unit, Peace Forces Administrative Section, which later became the Field Operation Division. On 14 July 1987, his appointment was extended for two years. With effect from 3 January 1989, he was temporarily reassigned from Headquarters to the United Nations Angola Verification Mission II (UNAVEM II), Luanda, as Chief Administrative Officer, with a special post allowance to the P-5 level. On 14 July 1989, his fixed-term appointment was extended for three years, after which he received shorter extensions of varying duration. The Applicant was promoted to the P-5, step I level, with effect from 1 August 1990. On 31 January 1991, he was reassigned from UNAVEM to the United Nations Interim Force in Lebanon as Chief Procurement Officer. From 20 June 1991 to 7 September 1993, he served as Chief Administrative Officer, UNAVEM, with a special post allowance to the D-1 level. With effect from 8 September 1993, he was reassigned temporarily to UNOSOM, Somalia as Chief, Technical Services. The Applicant was suspended with pay from 20 April 1994 to 18 October 1994, when he was reappointed as Senior Administrative Officer, at the P-5, step VI level, in the Department of Peace-Keeping Operations.

During their initial deployment period from August 1991 to April 1992, there was a shortage of adequate housing for UNAVEM's staff, consisting of more than 250 international military, police, medical staff and other civilian personnel in Luanda. As described in writing by several staff members, the housing situation in Luanda

at that time was "desperate" due to the absence of a housing infrastructure and the consequent lack of proper accommodation. The investigations carried out by the Joint Appeals Board (JAB) showed that, due to the short supply of, and the resulting "competition" among all international organizations for, accommodation, various landlords imposed restrictions which potential renters had little option but to accept if they wished to provide their staff with adequate housing.

The Applicant reported for duty as Chief Administrative Officer on 20 June 1991. For about six months, until the arrival of the head of UNAVEM II, he was the highest ranking civilian. During that period, he reported to the Military Commander of the Mission.

Subsequent to a 23 June 1993 meeting of the Assistant Secretary-General for Inspections and Investigations, the Executive Director of UNAVEM and the Legal Advisor of UNAVEM, the Under-Secretary-General for Administration and Management requested two senior staff members of the Organization to visit UNAVEM II's Headquarters in Luanda, to establish the facts relating to a number of allegations made against the Applicant.

On 9 December 1993, the fact-finding mission submitted its report. Its findings in relation to housing for staff of UNAVEM II read as follows:

> "I. Discrimination in housing of UNAVEM staff
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> 6. The documentation assembled in the course of the investigation on this subject is attached as Annex I to this report. Based on that documentation and the personal interviews that were conducted, our findings are as follows:
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> a) UNAVEM II rented up to 5 apartments at the Czech Embassy in Luanda during the period January - September 1992;
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> b) The lease agreements were signed on behalf of UNAVEM II by [the Applicant], [who was the] Chief Administrative Officer [CAO]; monthly rent was set at $1,000.00 per apartment and the lease could be terminated by either party upon 30 days written notice;

c) The lease terms were negotiated by the Czech Ambassador and [the Applicant]; they included the unwritten, but clearly understood condition that black staff members of UNAVEM II would not be housed there;

d) The prohibition did not extend to Filipino, Chinese and other light-skinned Asian staff, but covered dark-skinned Asians (including specifically the current Camp Manager, [...], who is a dark-skinned Sri Lankan);

e) The exclusion policy was known to and enforced by UNAVEM staff responsible for arranging housing assignments, namely Ms. [X], Camp Manager Mr. [...] and later Camp Manager Mr. [...];

f) [The Applicant] admitted that he had agreed to the restriction at the insistence of the Czech Ambassador, at a time when there was an acute housing shortage for UNAVEM staff;

g) Various people interviewed gave the following possible explanations for the rationale that might have been behind the Czech insistence on housing discrimination directed against black UNAVEM II staff members:

i) ... (former UNAVEM Legal Officer): the property, owned by the Angolan Government, was leased to the Czech Embassy with a prohibition against sub-letting, and the presence of black tenants would be clear evidence of the violation of that prohibition;

ii) ... (Chief Political Officer): the Angolan Government did not want blacks to be housed there, both for security reasons and to prevent unauthorized contacts between Angolans and foreign embassies;

iii) [The Applicant] (CAO): the Angolan Government, which owned the property, did not want any Angolans to move in because it would be practically impossible to get them to move out later;

iv) ... (Chief General Service Officer): staff of the Czech Embassy would have been 'harassed' by the Angolan authorities if blacks were permitted to live there.

h) Although the policy was quite well known within UNAVEM, no one raised any formal objection or complaint with the Executive Director or Chief Administrative Officer of UNAVEM II until a general staff meeting that was convened on 17 July 1992, on the occasion of the visit to UNAVEM of [the Director of the Field Operations Division]; the issue was raised at that time by [the Senior Political Officer];

i) At the 17 July 1992 staff meeting, [the Director, FOD] requested [the Applicant] to look into the matter;

j) Shortly after 17 July 1992, at a regularly scheduled meeting among the Special Representative of the Secretary-General [...], Executive Director [...] and [the Applicant], [the Applicant] was told to terminate the lease arrangement with the Czech Embassy;

k) Formal notice of the lease termination was sent by [the Applicant] to the Czech Embassy on 17 August 1992;

l) By a memorandum of 24 August 1992 [the Applicant] advised UNAVEM senior staff that UNAVEM would not be renting apartments at the Czech Embassy as of 17 September 1992; by that date, other accommodations were found for the staff who were then housed at the Czech Embassy."

On 18 April 1994, the Officer-in-Charge of the Staff Administration and Training Division, Office of Human Resources Management (OHRM), transmitted a copy of the Mission's report to the Applicant and charged him with misconduct, by "making arrangements for segregated housing for UNAVEM II staff members". In this letter, the Applicant was informed that "the Secretary-General has decided, in the interest of the Organization, to suspend you from duty with full pay under staff rule 110.2, effective immediately ... This suspension will have a probable duration of three months". The Applicant was also advised that he was to remain in Mogadishu.

On 6 June 1994, the Applicant submitted a written statement in response to the charge. He pointed out that his former direct supervisor had given him a strong personal recommendation. In a letter dated 26 May 1994, to the Under-Secretary-General for Administration and Management, the Applicant's former direct

supervisor underlined that she "never detected any act or expression that could remotely be interpreted as racial discrimination".

On 9 September 1994, the Assistant Secretary-General, OHRM, submitted the case to the Joint Disciplinary Committee (JDC) at Headquarters, asking "what disciplinary measure should be taken against him [the Applicant] in connection with the charge that he, as Chief Administrative Officer in UNAVEM II, entered into an agreement to house UNAVEM staff under a segregated housing policy for UNAVEM II staff".

On 18 October 1994, the Applicant was informed by a memorandum from the Assistant Secretary-General, OHRM, that "I have decided to lift your suspension from duty with immediate effect."

The JDC adopted its report on 18 January 1995. Its conclusions and recommendation read as follows:

> "24. The Panel read carefully the records before it and examined the testimonies given at the hearings. The Panel concluded that despite the fact that the staff member had intended to alleviate problems with staff housing by accepting the unwritten condition in the lease agreement with the Czech Embassy, namely that Angolan nationals and, by extension black/dark-skinned staff members of UNAVEM II, would not be housed in the Embassy accommodation, he had acted in a manner clearly incompatible with the standard of conduct required of a United Nations staff member.
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> 25. The Panel recognized that the housing situation in Luanda was desperate and that the staff member made every effort to relieve it to the maximum extent possible. However, in his desire to achieve some success, he exercised poor judgement. He was oblivious to the need to respect the fundamental principle of the United Nations Charter, respect of human rights, which cannot be sacrificed under any circumstances.
>
> 26. The Panel concluded that there was no improper motive underlying the staff member's decision to enter into an agreement to house UNAVEM II staff under a segregated housing policy. The Panel considered that the staff member was blind to the implications of his decision.

27. The Panel noted that it was not only the staff member who was blind to the above-mentioned consequences. This was derived from the evidence before it, and from the findings of the Fact Finding Mission, namely that '... the policy was quite well known within UNAVEM'.

28. The Panel was extremely disturbed to find that, during seven months, none of the staff serving in Luanda complained about the housing restriction to the staff member, or to his supervisors, even though the staff member renewed this agreement with the Czech Embassy, after his supervisors were already in Luanda. The Panel noted that if [the Director, FOD] had not come to Luanda, the issue might not have been publicly aired.

29. The Panel concurred with [the Assistant Secretary-General for Inspections and Investigations]'s words in his memorandum to [the Under-Secretary-General for Administration and Management] that '... the conduct of all those senior officials who knew about this arrangement and failed to take corrective action [constituted] failure in their responsibility. This conduct may also merit appropriate reprimand in view of the seriousness of the matter at hand. I find it disturbing that although this policy was widely known at UNAVEM, including by the head of the Field Service Staff Association, no formal complaints were voiced until [the Director, FOD]'s visit to UNAVEM in July 1992'.

30. The Panel did not find that the staff member was motivated by racial discrimination in the implementation of the restriction by the Czech Embassy. The Panel noted statements by the witnesses that the staff member had personally no racist attitudes.

31. The Panel noted the staff member's overall excellent performance based on the PER's submitted, and the testimonies heard.

32. The Panel also took into account that the staff member was working under very difficult conditions in a country at war.

33. The Panel concluded that the staff member was clearly at fault for his inability to see the seriousness of his decision by entering into a lease agreement which included an unwritten restrictive clause segregating UNAVEM staff, but, for the reasons indicated above, there was no intent to act in a racist manner. In this context, the Panel noted the

staff member's statement that 'if he were to go back in time he would not make the same decision'.

Recommendation:

34. The Panel is concerned with the lack of sensitivity which the staff member displayed when he made the decision to enter into a lease agreement which included an unwritten restrictive clause with a segregating housing policy for UNAVEM II staff.

35. The Panel is disturbed by the staff member's inability to see the implications of his actions, and to understand the responsibility he had at his level to uphold and protect one of the basic principles of the United Nations Charter. The Panel considers that such behaviour constitutes a misconduct under the Staff Rules.

36. The Panel unanimously agreed that a written censure of the Secretary-General is an appropriate sanction."

On 16 February 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and advised him as follows:

"The Secretary-General has examined your case in the light of the Committee's report. He agrees with the Committee's conclusion that you were clearly at fault for your inability to see the seriousness of your decision by entering into and implementing a lease agreement which included an unwritten restrictive clause segregating UNAVEM II staff. The Secretary-General has concluded that such decision and implementation constituted misconduct.

The Secretary-General has given careful consideration to the mitigating factors including the very difficult conditions under which you were working in a country at war; and the apparent absence of objection from other UNAVEM II staff. However, these factors cannot excuse your actions as Chief Administrative Officer. The Secretary-General has concluded that you failed to exercise proper judgement as the Chief Administrative Officer with a responsibility, inter alia, to uphold and protect one of the basic principles of the United Nations Charter. On the Committee's conclusion that there was no intent to act in a racist manner, the Secretary-General wishes to reiterate that, where a staff member's conduct is in breach of an applicable regulation,

rule or administrative issuance, or falls below the standard expected of an international civil servant, such conduct would be considered as culpable, and the absence of an accompanying wrongful intent would not constitute an excuse. For the above reasons, the Secretary-General cannot accept the sanction recommended by the Committee which he finds too lenient for such serious misconduct.

Pursuant to the Secretary-General's discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to demote you, under staff rule 110.3(a)(vi), to the P-4 level, step VI, at which level and step you will remain for one year.

In accordance with staff rule 110.4(d), any appeal you might wish to file in respect of the above decision should be submitted directly to the Administrative Tribunal."

By a letter dated 2 March 1995, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"... as a matter of clarification, this is to confirm that at the end of the stated one year period of demotion, you will become eligible anew to the regular incremental step increase within grade. In accordance with your performance record and Staff Rules, you may then also become eligible for consideration for promotion. For the record and on the basis of the effective date of your most recent step increase, your demotion is effective 16 February 1995 at the P-4 step VII level."

On 19 May 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Imposition of a disciplinary measure was improper because it occurred two years after the event.

2. The Applicant's suspension with pay for an extended period of investigation was prejudicial.

3. The JDC denied the Applicant due process in that a prejudicial statement was not sent to him for comments prior to the submission of the JDC's report to the Secretary-General.

4. The Secretary-General's decision to impose a disciplinary sanction on the Applicant violated his rights because it was far in excess of the sanction recommended by the JDC and because it failed to take into account both the lack of the Applicant's intent to engage in racial discrimination and the difficult housing situation in Angola.

Whereas the Respondent's principal contentions are:

1. The Applicant's suspension, pending investigation of a number of serious charges, was proper and was lifted after it became apparent that only one charge would be submitted to the JDC and that this charge would not be quickly finalized.

2. The charge against the Applicant was heard by the JDC, which accorded the Applicant due process.

3. The Respondent is not bound to accept the recommendations of the JDC.

The Tribunal, having deliberated from 28 October to 21 November 1996, now pronounces the following judgement:

I. The significant facts in this case are not in dispute. While serving as Chief Administrative Officer of UNAVEM II in Angola, the Applicant, under pressure to find adequate housing for UN personnel, concluded a lease agreement with the Czech Embassy in Angola, which included the unwritten condition that Angolan nationals, or those who could be mistaken for them, could not be accommodated in, or even admitted to, the Czech property. Following a preliminary investigation, charges were brought against the Applicant for having made this arrangement, as well as several other alleged administrative irregularities. The Applicant was suspended with pay, and the case was referred to the Joint Disciplinary Committee (JDC), leading ultimately to the imposition of disciplinary

sanctions by the Secretary-General in connection with the housing arrangement with the Czech Embassy. The other charges were dropped.

II. It is clear that the unwritten condition of the housing arrangement was intended to preclude the use of the leased embassy apartments by black or dark-skinned people, including UN staff members. The Applicant denies any intent to create segregated housing and stresses the administrative necessity of the arrangement, due to the shortage of adequate housing in Luanda. The concern of the Czech Embassy appears to have been either an Angolan Government requirement that no Angolans occupy the apartments, or the possibility that the sub-leasing arrangements might be more readily discoverable, if dark-skinned occupants were allowed as tenants or otherwise admitted to the premises. The Applicant notes that other leases were restricted to certain other people, based on their nationality.

III. The Tribunal accepts the good faith of the Applicant, as did the JDC and the Administration. The Tribunal also accepts the finding of the JDC, endorsed by the Administration, that the Applicant exercised poor judgement in accepting a condition on behalf of the United Nations that housing and facilities would be used for white and light-skinned staff members only. Irrespective of any explanation, such a condition is abhorrent to the principles set forth in the Charter, and the Tribunal agrees with the JDC, that such principles "cannot be sacrificed under any circumstances".

IV. The Applicant justifies his action, noting that the discriminatory aspect of the housing arrangement was not initiated by him, was not the subject of complaints at the time, and did not endanger life or health. He does not recognize that, in accepting a housing condition based on skin color, he condoned racial discrimination as being acceptable under the circumstances and made

the United Nations an accomplice to a fundamental violation of human rights, particularly hurtful to the black and dark-skinned staff members serving UNAVEM, as evidenced by several statements in the record.

V. In these circumstances, the Tribunal finds that the disciplinary measure imposed by the Secretary-General on the Applicant was both justified and a reasonable exercise of discretion. The JDC's recommendations are advisory in nature. The fact that the Secretary-General's disciplinary measure was more severe than the reprimand recommended by the JDC is not inconsistent with the proper exercise of his discretion. There has been no evidence that the exercise of this discretion was tainted by any improper motives.

VI. The Applicant asserts that he was denied due process by the JDC because a statement made by the Executive Director of UNAVEM, in response to questions put by the JDC, was not made available to him or his counsel for comment before the JDC concluded its report. The Secretary of the JDC contends that the Applicant was personally handed a copy of this statement. In the light of the statements made, it seems possible that the Applicant received this statement but that it was transmitted to his counsel belatedly. The Tribunal has examined the comments of the Applicant on the statement and finds that, even if they are all accepted as clarifications of the facts of the case, the underlying issue remains the same. The Applicant does not contest that he acquiesced to a housing arrangement with an unwritten condition excluding staff members on the basis of their skin color. This is the essential fact on the basis of which the JDC made its findings, having taken into account the explanations offered by the Applicant. The Tribunal finds that the proceedings before the JDC were not conducted in a manner inconsistent with the rights of the Applicant.

VII. The Applicant contends that his suspension was unjustified in terms of the rules and regulations and constituted a de facto disciplinary measure. ST/AI/371, which governs the imposition of disciplinary measures, sets forth the conditions for suspension. The Applicant cites a provision which states that "as a general principle, suspension may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed ..." The Tribunal notes that the cited provision follows a more general one, which states, "If the conduct appears to be of such a nature and of such gravity that suspension may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons". Several charges of administrative irregularities were made against the Applicant at the time of his suspension. These charges address a number of different decisions which had been made by the Applicant and which suggested the possibility of poor judgement and even financial impropriety. Shortly thereafter, the charges were narrowed to the single action taken by the Applicant in connection with the leased apartments. The suspension with pay was ended. Although the Applicant was suspended, there is no evidence to suggest that the suspension was imposed as a penalty. The Tribunal finds that the decision to impose suspension was within the discretionary authority of the Secretary-General and was correctly taken.

VIII. The Applicant further contends that his permanent demotion was a far more serious punishment than was set forth in the decision from the Under-Secretary-General, dated 16 February 1995. By that letter, the Applicant was informed that "the Secretary-General has decided to demote you, under staff rule 110.3 (a) (vi), to the P-4 level, step VI, at which level and step you will remain for one year". By a letter dated 2 March 1995, the Under-Secretary-General informed the Applicant that "as a matter of clarification, this is

to confirm that, at the end of the stated one-year period of demotion, you will become eligible anew to the regular incremental step increase within grade" and "may then also become eligible for consideration for promotion." The Tribunal finds that this "clarification" constitutes an additional penalty that was not stated in the letter of 16 February 1995. The clear indication in that letter is that the penalty is a twelve-month demotion, after which period the Applicant would revert to the grade and step in which he found himself at the time of demotion. Thus, the Tribunal finds that the Applicant, as of 17 February 1996, should have reverted to the P-5, step VII level, eligible for step increases after twelve months at that level.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the difference between the amount he received on and after 17 February 1996 and what he should have received at the P-5, step VII level on that date and thereafter.

X. The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
President

Mikuin Leliel BALANDA
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary